

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

JAMES WRIGHT, JR.,

Case No. 3:12-cv-00286-MMD-VPC

Petitioner,

ORDER

v.

ROBERT LEGRAND, *et al.*,

Respondents.

This represented habeas matter comes before the Court on respondents' motion to dismiss (dkt. no. 40), petitioner's motion to stay (dkt. no. 47), and a motion for an extension of time (dkt. no. 52). Respondents seek the dismissal of a number of grounds as untimely and/or unexhausted.<sup>1</sup> Petitioner opposes dismissal on these bases, relying on relation back for timeliness. Petitioner seeks a stay to return to state court to exhaust Ground 7.

**I. BACKGROUND**

Petitioner James Wright, Jr. challenges his Nevada state conviction, pursuant to a jury verdict, of robbery with the use of a firearm and eluding a police officer along with his adjudication as a habitual criminal. Wright challenged the conviction on direct appeal and on state post-conviction review.

---

<sup>1</sup>In the reply on the motion to dismiss, respondents withdrew procedural defenses to a number of grounds. See dkt. no. 50, at 2-4 & 6. The Court discusses herein only the grounds as to which a procedural defense still is pursued following the reply.

1     **II.     TIMELINESS AND RELATION BACK**

2           **A.     Governing Law**

3           A claim in an amended petition that is filed after the expiration of the one-year  
4     limitation period will be timely only if the claim relates back to a claim in a timely-filed  
5     claim under Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the  
6     claim arises out of “the same conduct, transaction or occurrence” as the timely claim.  
7     *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the Supreme Court held that habeas  
8     claims in an amended petition do not arise out of “the same conduct, transaction or  
9     occurrence” as prior timely claims merely because the claims all challenge the same  
10    trial, conviction or sentence. 545 U.S. at 655-64. Rather, under the construction of the  
11    rule approved in *Mayle*, Rule 15(c) permits relation back of habeas claims asserted in  
12    an amended petition “only when the claims added by amendment arise from the same  
13    core facts as the timely filed claims, and not when the new claims depend upon events  
14    separate in ‘both time and type’ from the originally raised episodes.” 545 U.S. at 657. In  
15    this regard, the reviewing court looks to “the existence of a common ‘core of operative  
16    facts’ uniting the original and newly asserted claims.” A claim that merely adds “a new  
17    legal theory tied to the same operative facts as those initially alleged” will relate back  
18    and be timely. 545 U.S. at 659 & n.5.

19           **B.     Ground 2(a)**

20           In Ground 2(a), petitioner alleges that he was denied effective assistance of trial  
21    counsel when counsel failed to object to questioning that elicited testimony about his co-  
22    defendant’s statements implicating petitioner. Wright alleges in particular that the state  
23    trial court reversed a ruling severing his case from co-defendant Kevin Gill’s case based  
24    upon a condition that the State could not elicit any testimony during its case in chief  
25    regarding Gill’s statements implicating Wright. Petitioner alleges that the State did not  
26    elicit such testimony during its case in chief but that the State cross-examined Gill as to  
27    the inculpatory statements and then called Detective Jenkins to testify to Gill’s

28    ///

1 statements implicating Wright. Petitioner alleges that counsel was ineffective for failing  
2 to object to this questioning as to Gill's statements.

3 The Court is persuaded that the claim in amended Ground 2(a) that trial counsel  
4 was ineffective for failing to object to the questioning as to Gill's statements relates back  
5 to both: (1) the substantive claim in original Ground 2 alleging prosecutorial misconduct  
6 based upon the questioning of Detective Jenkins regarding Gill's statements; and (2)  
7 the ineffective-assistance claim in original Ground 5 alleging that counsel was  
8 ineffective for failing to object to the prosecutor's alleged misconduct in eliciting  
9 testimony as to Gill's statements.

10 In this regard, the Court is not persuaded by the argument that the ineffective-  
11 assistance claim in amended Ground 2(a) inherently arises from operative facts  
12 different in time and type from the substantive claim in original Ground 2 because the  
13 ineffective-assistance claim is directed to defense counsel's actions whereas the  
14 substantive claim is directed to the prosecutor's actions. The apposite governing  
15 principle instead is that a claim based upon a different legal theory that is tied to the  
16 same operative facts relates back to the prior claim. *Mayle, supra*. Both amended  
17 Ground 2(a) and original Ground 2 arise from the same operative facts — questioning as  
18 to Gill's statements inculcating Wright. The point that the amended claim is based upon  
19 a legal theory of ineffective assistance of counsel and the original claim was based  
20 upon a legal theory of prosecutorial misconduct is not determinative. *See, e.g., Ha Van*  
21 *Nguyen v. Curry*, 736 F.3d 1287, 1296-97 (9<sup>th</sup> Cir. 2013) (amended claim of ineffective  
22 assistance of counsel for failing to raise double jeopardy claim related back to  
23 substantive claim in original petition).

24 The Ninth Circuit decision in *Schneider v. McDaniel*, 674 F.3d 1144 (9<sup>th</sup> Cir.),  
25 *cert. denied*, 133 S.Ct. 579 (2012), is not to the contrary. In *Schneider*, an amended  
26 substantive claim challenging the trial court's denial of a mid-trial motion to sever did not  
27 relate back to an original ineffective-assistance claim based on trial counsel's pretrial  
28 failure to investigate the co-defendant's trial strategy. 674 F.3d at 1151. The

1 *Schneider* panel did note that the theory of the original claim was based upon counsel's  
2 alleged failures — which occurred prior to trial — and that the theory of the amended  
3 claim was based upon the trial court's alleged errors — which occurred after the trial  
4 commenced. *Id.* However, *Schneider* made no holding that a claim of ineffective  
5 assistance of counsel never can relate back to a substantive claim even where the  
6 ineffective-assistance claim and the substantive claim arise from the same operative  
7 facts — such as allegedly improper questioning to which counsel did not object.<sup>2</sup>

8 The Court further finds that amended Ground 2(a) relates back also to the  
9 ineffective-assistance claim in original Ground 5. Respondents contend that the  
10 operative facts in original Ground 5 did not include a failure to object to the questioning  
11 of Detective Jenkins regarding Gill's statements. However, the operative facts should  
12 not be parsed so narrowly in this context. The claims instead arise from operative facts  
13 consisting of questioning as to Gill's statements inculcating Wright. A claim that trial  
14 counsel was ineffective for failing to object to the questioning of one witness regarding  
15 Gill's statements (*i.e.*, Jenkins) relates back to the original claim that counsel was  
16 ineffective for failing to object to the questioning of another witness regarding the  
17 statements (*i.e.*, Gill himself). See, *e.g.*, *Valdovinos v. McGrath*, 598 F.3d 568, 574-76  
18 (9th Cir. 2010), *judgment vacated on other grounds for reconsideration*, 131 S.Ct. 1042  
19 (2011), *prior relevant holding adhered to in unpublished decision*, 2011 WL 996660, slip  
20 op. at \*722 (9th Cir., Mar. 22, 2011) (*Brady* claim and related ineffective-assistance  
21 claim based upon failure to disclose additional items of exculpatory evidence related  
22 back to prior claims regarding nondisclosure of other items of exculpatory evidence);

23  
24 <sup>2</sup>The Court is not persuaded that *Ha Van Nguyen* is inconsistent with *Schneider*.  
25 Any such conflict in Ninth Circuit precedent in any event would not be resolved simply  
26 by following the earlier case. Respondents cite *Avagyan v. Holder*, 646 F.3d 672 (9<sup>th</sup>  
27 Cir. 2011), for established law that a later panel is bound by a prior panel decision.  
28 However, when a conflict nonetheless does arise between two prior lines of authority,  
the Ninth Circuit does not follow a rule under which the earlier line controls. Rather, the  
circuit conflict can be resolved only on *en banc* review. See *Antonio v. Wards Cove  
Packing Co., Inc.*, 810 F.3d 1477, 1478-79 (9<sup>th</sup> Cir. 1987) (*en banc*). There is no such  
conflict in this instance because the cases are not inconsistent with one another.

1 see also *Rodriguez v. Adams*, 545 Fed.Appx. 620 (9<sup>th</sup> Cir. Nov. 18, 2013) (later claim  
2 that counsel was ineffective for failing to investigate the testimony of two potential  
3 exculpatory witnesses who were present at the scene related back to earlier claim that  
4 counsel was ineffective for failing to investigate the testimony of three other witnesses  
5 who also were present at the scene).

6 Amended Ground 2(a) accordingly relates back to original Ground 2 and original  
7 Ground 5, whether looked at separately or instead together. Ground 2(a) therefore is  
8 timely.<sup>3</sup>

9 **C. Ground 6**

10 In Ground 6, petitioner alleges that he was denied effective assistance of trial  
11 counsel because counsel failed to move to suppress evidence obtained from the search  
12 of his car because of allegedly unreliable information contained in the search warrant.  
13 Petitioner alleges in particular that counsel should have sought suppression on the  
14 basis that co-defendant Kevin Gill's statement used as a basis for the search warrant  
15 was unreliable because he was under the influence of drugs at the time.

16 Although the question is a closer one, the Court is persuaded that amended  
17 Ground 6 relates back to original Ground 8. In original Ground 8, petitioner alleged that  
18 trial counsel should have sought suppression for lack of a supporting affidavit  
19 establishing the grounds for issuing the search warrant and that counsel failed to verify  
20 the validity of the search warrant.<sup>4</sup> The amended claim relates back to the operative  
21 facts of counsel's failure to verify the validity of the search warrant and to challenge  
22

---

23 <sup>3</sup>Respondents expressly have withdrawn an argument made initially in the motion  
24 to dismiss that *King v. Ryan*, 564 F.3d 1133 (9<sup>th</sup> Cir. 2009), requires that the claim in the  
25 prior pleading must have been exhausted for a later claim to be able to relate back to  
26 the claim. See dkt. no. 50, at 2, lines 10-13. The Court notes that, in contrast to *King*, no  
27 claims from a prior pleading are being dismissed in this case and then later reasserted,  
28 which occurs when a stay is sought instead under *Kelly v. Small*, 315 F.3d 1063 (9<sup>th</sup> Cir.  
2003). Any issue as to the application of *King* to this case in any event is abandoned  
and thus no longer is preserved in the district court in this case. The Court thus does not  
consider the argument further.

<sup>4</sup>See dkt. no. 6, at handwritten page numbers 55, 56 (at top of page), & 57 (at top  
of page).

whether the warrant was properly factually supported. *Cf. Valdovinos, supra; Rodriguez, supra.*<sup>5</sup>

Amended Ground 6 therefore relates back to original Ground 8 and is timely.

#### **D. Ground 7**

In Ground 7, petitioner alleges that he was denied effective assistance of trial counsel during the plea bargaining process because counsel abandoned pursuit of a plea bargain that would have been more favorable to petitioner than the later trial outcome. This ground relies upon the Supreme Court decision in *Laffler v. Cooper*, 132 S.Ct. 1376 (2012), and it follows upon petitioner's efforts to timely assert the claim *pro se*.

The timeliness of this ground must be assessed against the backdrop of the early procedural history in this federal action.

Petitioner constructively filed the original petition by mailing his papers to the Clerk on or about May 24, 2012.

At that time, the one-year federal limitation period would not expire until October 11, 2012, absent other tolling or delayed accrual.<sup>6</sup>

---

<sup>5</sup>The Court is not as sanguine that there is relation back as argued by petitioner because original Ground 8 also refers to counsel's failure to object at trial to the reliability of Gill's testimony as evidence of guilt at trial.

<sup>6</sup>Petitioner filed his state post-conviction petition during the pendency of his direct appeal. Accordingly, no time expired in the federal limitation period prior to the October 11, 2011, issuance of the remittitur on the state post-conviction appeal. The limitation period, therefore, began to run after this date and expired on the October 11, 2012, one-year anniversary date of the issuance of the remittitur.

Although the point is not critical to the analysis herein, petitioner and respondents both reach different expiration dates.

Petitioner identifies October 10, 2012, as the expiration date, by counting 365 days after October 11, 2011, including February 29, 2012, in the leap year. It is the Court's understanding that the anniversary date — rather than a 365-day count — instead controls in a leap year on a simple one year count. *See, e.g., United States v. Hurst*, 322 F.3d 1256, 1260 (10<sup>th</sup> Cir. 2003); *United States v. Tawab*, 984 F.2d 1533, 1534 (9<sup>th</sup> Cir. 1993); *Connors v. Marshall*, 2010 WL 1726882, at \*2 (C.D. Cal. Feb. 1, 2010).

Respondents identify October 12, 2012, as the expiration date. Putting leap years to the side, if the limitation period begins running after October 11 in the first year, then October 12 of that year is day 1 in the count, and October 11 of the following year is day 365. That is, one does not wait until October 13 of the first year to start running  
(*fn. cont...*)



1 On August 13, 2012, the Court issued an order that in the main directed service  
2 and a response to the *pro se* original petition. The order additionally included the  
3 following advisement to the *pro se* petitioner:

4 . . . . A petition for federal habeas corpus should include all claims  
5 for relief of which petitioner is aware. If petitioner fails to include such a  
6 claim in his petition, he may be forever barred from seeking federal  
7 habeas relief upon that claim. See 28 U.S.C. §2254(b) (successive  
8 petitions). If petitioner is aware of any claim not included in his petition, he  
9 should *notify* the court of that *as soon as possible, perhaps* by means of a  
10 motion to amend his petition to add the claim.

11 Dkt. no. 5, at 2, lines 3-8 (emphasis added).

12 As the italicized emphasis reflects, the Court: (a) told petitioner only that he  
13 should “notify” the Court and only “perhaps” by a motion for leave to amend if he had  
14 additional claims; (b) told him that he should do so only “as soon as possible” without  
15 setting any particular deadline; and (c) did not indicate that he actually needed to act not  
16 merely “as soon as possible” but instead by an October 11, 2012, hard deadline — only  
17 two months away — to properly preserve claims as against the federal time-bar.

18 Petitioner did, in fact, notify the Court that he had another claim that he wished to  
19 pursue, the *Lafler* claim. He did so exceedingly promptly, mailing his paper for filing on  
20 September 10, 2012, less than thirty (30) days after entry of the August 13, 2012, order.  
21 And he notified the Court of the additional claim in response to the order within the  
22 federal limitation period.

23 However, he did not notify the Court of the additional claim specifically via a  
24 motion for leave to amend the petition.<sup>7</sup> He instead notified the Court of the additional  
25 claim via a motion to stay the action so that he could return to state court to exhaust a  
26 *Lafler* claim. Petitioner attached with the motion an exhibit in which he set forth his  
27 entire *Lafler* ground in the same manner as one would do in a petition. The only

28 

---

 (...fn. cont.)

the count at day 1. The limitation period instead begins running after October 11, *i.e.*,  
with October 12 being the first counted expired day in the limitation period.

<sup>7</sup>Under Rule 15(a)(1)(A), a motion for leave would be necessary for a first  
amending pleading only if the amendment was sought more than 21 days after service  
of the prior pleading.

1 difference was that the three-page ground was not set forth within a document styled as  
2 a pleading.

3 At no time did the Court expand on the prior advisement in the August 13, 2012,  
4 order to inform the *pro se* petitioner that his September 10, 2012, motion to stay that he  
5 filed promptly in response to that order might not “notify” the Court of the claim in a  
6 manner sufficient to preserve the claim by the October 11, 2012, limitation period  
7 deadline.

8 On February 22, 2013, after the expiration of the federal limitation period, the  
9 Court denied the stay without prejudice and granted petitioner’s motion for  
10 reconsideration of its prior denial of appointment of counsel. The order stated *inter alia*:

11 On September 12, 2012, before respondents had responded to the  
12 petition in any way, petitioner filed a motion for stay and abeyance (ECF  
13 #8). He seeks a stay in this action in order that he may exhaust a claim in  
14 state court. He attaches as an exhibit an additional ground that he  
15 received ineffective assistance of counsel during plea negotiations and  
16 that but for that ineffective assistance he would have accepted the plea  
17 agreement, which carried a sentence that was substantially shorter than  
18 the sentence he received after a jury found him guilty. . . .

19 Respondents correctly point out in their opposition that a motion for  
20 stay and abeyance is inapposite here because the ground is not already  
21 set forth in petitioner’s federal petition (ECF #11). Accordingly, petitioner’s  
22 motion for stay and abeyance is denied (ECF #8). As will be discussed  
23 below, counsel shall be appointed in this case, and thereafter, counsel for  
24 petitioner shall file an amended petition. The amended petition shall set  
25 forth all grounds for relief.

26 Dkt. no. 27, at 1-2.

27 On the pending motion to dismiss, respondents contend that amended Ground 7  
28 in the counseled first amended petition cannot relate back to the fully-articulated *Lafler*  
ground submitted with the *pro se* stay motion because it was not contained within a  
formal pleading.

The Court is not persuaded. Even putting the August 13, 2012, order to one side,  
courts must liberally construe the substance of *pro se* filings, regardless of their form or

///

///



1 title.<sup>8</sup> Respondents are correct that a *pro se* litigant must comply with all applicable  
 2 procedural rules, after being notified of and being given an opportunity to correct the  
 3 deficiency. That does not mean, however, that a *pro se* litigant who timely files a viable  
 4 claim for relief in a procedurally defective manner must suffer a limitations-based  
 5 dismissal. Such a draconian approach has been rejected in other contexts even with  
 6 regard to counseled filings. *Cf.* Fed. R. Civ. Pro. 5(d)(4) (the rule bars a clerk from  
 7 refusing to file a paper in defective form, with the 1991 advisory committee notes  
 8 reflecting that the rule was adopted to eliminate limitations-based dismissals where  
 9 papers were timely but defective); *see also* Fed. R. Civ. Pro 15(c)(1)(B) (referring to a  
 10 claim “set out — or attempted to be set out — in the original pleading”). Thus, the Court  
 11 certainly would have been able to direct petitioner to amend to file a procedurally  
 12 compliant pleading. However, it still must construe the *pro se* paper that he did file  
 13 liberally as a prior partial pleading for purposes of relation back under Rule 15(c).

14 This conclusion follows with even greater force when the Court’s August 13,  
 15 2012, order also is taken into consideration. The *pro se* petitioner presented the claim in  
 16 a manner that was permitted by the order. The Court told petitioner only that he need  
 17 “notify” the Court if he had additional claims and only that he “perhaps” needed to  
 18 present the claims in an amended pleading. The Court further told him that he needed  
 19 to do so only “as soon as possible.” The order — after raising the matter of time in this  
 20 fashion — did not then fully inform petitioner that a failure to “notify” the Court of the  
 21 claims instead in a formal pleading specifically by the impending limitation period  
 22

---

23 <sup>8</sup>*See, e.g., Andrews v. United States*, 373 U.S. 334, 338 (1963) (*pro se* motion  
 24 filed in a federal criminal case was construed instead as a § 2255 proceeding, applying  
 25 the principle that “adjudication upon the underlying merits of claims [should not be]  
 26 hampered by reliance upon the titles petitioners put upon their documents”); *Butler v.*  
 27 *Long*, \_\_\_ F.3d \_\_\_, 2014 WL 1717009, at \*2 (9<sup>th</sup> Cir. May 02, 2014); *Woods v. Carey*,  
 28 525 F.3d 886, 889-90 (9<sup>th</sup> Cir. 2008) (a habeas petition filed in new action while a first  
 petition still is pending must be treated as a motion to file an amended petition in the  
 first action, rather than applying a successive petition bar); *Balistreri v. Pacifica Police*  
*Dept.*, 901 F.2d 696, 698-99 (9<sup>th</sup> Cir. 1988), *overruled on other grounds*, *Bell Atlantic*  
*Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (*pro se* litigant did not waive her appeal by  
 failing to follow the formal brief-writing requirements).

1 expiration date risked imminent forfeiture of the claims. The only risk of claim forfeiture  
 2 identified in the order was that arising from the application of successive-petition rules to  
 3 a later federal petition.

4 Petitioner promptly responded to the order, and he notified the Court of the  
 5 additional ground in a manner that was not precluded by the nonspecific language of  
 6 the order. He presented a fully articulated ground in the same manner as in a pleading  
 7 save only for the fact that the ground was not set forth in a paper titled as a pleading.  
 8 He further did so within the federal limitation period. In such circumstances, the Court  
 9 cannot hold the *pro se* petitioner to adverse limitation consequences after he responded  
 10 to a court order in a fashion that was not precluded by the order.<sup>9</sup>

11 Ground 7 therefore relates back to the prior *pro se* ground submitted with the  
 12 motion to stay within the limitation period, such that the amended ground is timely.

13 ///

14 ///

---

15 <sup>9</sup>A federal court clearly is not required to provide advisements to *pro se*  
 16 petitioners as to procedure. See, e.g., *Pliler v. Ford*, 542 U.S. 225, 231-32 (2004). If an  
 17 original petition is sufficient and does not require amendment prior to service for a  
 18 response, there is no requirement that a court advise a petitioner that he should assert  
 19 all available claims. When advisements are given, however, they then “run the risk of  
 20 being misleading themselves.” 542 U.S. at 232. In such circumstances, a court cannot  
 21 hold a *pro se* petitioner to adverse consequences sustained in following an advisement  
 22 that – albeit unintentionally – affirmatively misled the petitioner. E.g., *Ford*, 542 U.S. at  
 23 233 & 234; see also *Sossa v. Diaz*, 729 F.3d 1225, 1231-35 (9<sup>th</sup> Cir. 2013) (the court  
 24 affirmatively misled the *pro se* petitioner by granting without qualification a requested  
 25 extension that exceeded the remaining limitation period). Advisements of course can be  
 26 as misleading by what they omit from the advisement, once undertaken, as by what  
 27 they explicitly state.

28 The Court has no occasion to consider here the potential ramifications where a  
 petitioner proceeds in this fashion after an intervening expiration of the limitation period  
 following upon an order with similar language. It suffices for the present case to hold  
 that the claim in the counseled amended petition relates back to the timely-filed *pro se*  
 claim, notwithstanding the fact that the claim was presented as an exhibit to a motion to  
 stay, particularly given the nonspecific language used in the August 13, 2012,  
 advisements given in this case.

Nothing in the February 22, 2013, order denying the motion to stay requires that  
 the Court rule to the contrary on the present motion due to law of the case. First, the  
 Court did not address relation back consequences in the order. Second, law of the case  
 does not apply to an interlocutory order by a district court on a point that has not been  
 affirmed on an intervening appeal in the case. See, e.g., *City of Los Angeles, Harbor  
 Division v. Santa Monica Baykeeper*, 254 F.3d 882, 888-89 (9<sup>th</sup> Cir. 2001).

1     **III.     EXHAUSTION**

2             **A.     Governing Law**

3             Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state  
4     court remedies on a claim before presenting that claim to the federal courts. To satisfy  
5     this exhaustion requirement, the claim must have been fairly presented to the state  
6     courts completely through to the highest court available, in this case the Supreme Court  
7     of Nevada. *E.g.*, *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*);  
8     *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner  
9     must refer to the specific federal constitutional guarantee and must also state the facts  
10    that entitle the petitioner to relief on the federal constitutional claim. *E.g.*, *Shumway v.*  
11   *Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the  
12    petitioner present the state courts with both the operative facts and the federal legal  
13    theory upon which the claim is based. *E.g.*, *Castillo v. McFadden*, 399 F.3d 993, 999  
14    (9th Cir. 2005). The exhaustion requirement ensures that the state courts, as a matter of  
15    federal-state comity, will have the first opportunity to pass upon and correct alleged  
16    violations of federal constitutional guarantees. *See, e.g.*, *Coleman v. Thompson*, 501  
17    U.S. 722, 731 (1991).

18            Under *Rose v. Lundy*, 455 U.S. 509 (1982), a mixed petition presenting both  
19    exhausted and unexhausted claims must be dismissed without prejudice unless the  
20    petitioner dismisses the unexhausted claims or seeks other appropriate relief.

21            **B.     Discussion**

22            The same exhaustion issue is presented as to Grounds 2, 4 and 6. There is no  
23    dispute that Ground 7 is unexhausted, with petitioner seeking a stay to exhaust the  
24    claim.

25            The sole exhaustion issue presented is whether the claims in Grounds 2, 4 and 6  
26    were fairly presented to the Supreme Court of Nevada on the state post-conviction  
27    appeal.

28    ///

1 On the appeal, petitioner provided no argument specific to the merits of these  
2 claims in the appellant's brief. He instead argued that the state district court's order  
3 dismissing "most of the issues raised in the petition" without an evidentiary hearing was  
4 an abuse of discretion and violated his due process rights. The only brief discussion of  
5 the merits under the issue was directed to one claim, a claim other than the claims in  
6 federal Grounds 2, 4 and 6.<sup>10</sup>

7 In its order of affirmance, the Supreme Court of Nevada rejected on the merits  
8 the one claim as to which petitioner had specifically discussed the merits under the  
9 evidentiary-hearing issue. The court held that the state district court had not erred in  
10 denying the claim without considering it at the evidentiary hearing.<sup>11</sup>

11 The state supreme court then stated the following in a footnote to the foregoing  
12 holding as to the one claim:

13 To the extent that appellant argues that the district court erred in  
14 declining to consider at an evidentiary hearing any of the additional claims  
15 raised below, appellant fails to provide cogent argument as to how or why  
16 the district court erred in denying these claims. "It is appellant's  
responsibility to present relevant authority and cogent argument; issues  
not so presented need not be addressed by this court." *Maresca v. State*,  
103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

17 Dkt. no. 18, Ex. 130, at 3 n.1.

18 The Court holds that petitioner did not fairly present the claims in federal  
19 Grounds 2, 4 and 6 to the Supreme Court of Nevada on the state post-conviction  
20 appeal. In contrast to the one claim as to which petitioner provided specific argument on  
21 the evidentiary-hearing issue, the state supreme court clearly did not address the  
22 remaining vaguely-referenced "most of the issues raised in the petition." It did not do so  
23 because petitioner failed to provide cogent argument on any of the claims. It is  
24 established law that presenting a claim in a procedural context in which the merits of the  
25 claim will not be considered, or will be considered only in special circumstances, does  
26 not constitute fair presentation of the claim. See, e.g., *Castille v. Peoples*, 489 U.S. 346,

27 <sup>10</sup>See dkt. no. 18, Ex. 128, at 12-13.

28 <sup>11</sup>Dkt. no. 18, Ex. 130, at 2-3.

351(1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). Appellate courts as a rule generally review only claims and issues argued specifically in the briefing, and a bare and conclusory assertion of a claim or issue does not preserve the claim or issue for appellate review. See, e.g., *Farmer v. McDaniel*, 666 F.3d 1228, 1233 n.5 (9th Cir. 2012); *Nevada Department of Corrections v. Greene*, 648 F.3d 1014, 1020 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1823 (2012). In the present case, the Supreme Court of Nevada clearly did not review the merits of any claims on petitioner's bare assertion of a multitude of claims in a blanket conclusory fashion, nor was it required to do so.

Grounds 2, 4 and 6 therefore are unexhausted.

#### IV. MOTION TO STAY

Petitioner seeks a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust the *Lafler* claim of ineffective assistance of trial counsel in Ground 7.<sup>12</sup>

To obtain a *Rhines* stay in order to return to the state courts to exhaust a claim, a petitioner must demonstrate that there was good cause for the failure to exhaust the claim, that the unexhausted claim is not plainly meritless, and that the petitioner has not engaged in intentionally dilatory litigation tactics. See 544 U.S. at 278.

///

///

---

<sup>12</sup>The Court is not persuaded that the motion to stay should be rejected at this point as premature or improperly filed. There is no rule that a stay may not be sought prior to a ruling on exhaustion issues in a motion to dismiss where, as here, there is no question as to whether a ground is unexhausted. The Court often appoints counsel in circumstances where it is understood that a motion for a stay likely will be filed with the counseled amended petition before any motion to dismiss is filed. The circumstances of when various issues are raised and/or decided in a particular case necessarily vary with the underlying situation presented in each case.

As to filing, the better practice would have been for counsel to file the opposition to the motion to dismiss and the motion to stay as separate documents. Petitioner, however, did present a motion to stay separately in the document, which then was docketed as two separate filings. The prior *Greene* and *Volpicelli* unpublished orders from this District referenced in the briefing disapproved of the assertion of a stay request embedded within an opposition to a motion to dismiss rather than as a filed and separately-briefed motion. Petitioner did not simply embed a stay request within an opposition memorandum here. With respect to the timing of the stay request, the *Volpicelli* order spoke to the more typical circumstance in which lack of exhaustion was not conceded as to any claim.

1           **A.     Good Cause**

2           As the Ninth Circuit recently emphasized in *Blake v. Baker*, 745 F.3d 977 (9<sup>th</sup> Cir.  
3 2014), the contours of what constitutes “good cause” under *Rhines* are not fully  
4 developed:

5           There is little authority on what constitutes good cause to excuse a  
6 petitioner's failure to exhaust. In *Rhines*, the Supreme Court did not  
7 explain the standard with precision. See 544 U.S. at 275-78, 125 S.Ct.  
8 1528. The Court has since addressed the meaning of good cause in only  
9 one other case, recognizing in dicta that “[a] petitioner's reasonable  
confusion about whether a state filing would be timely will ordinarily  
constitute ‘good cause’” to excuse his failure to exhaust. *Pace v.*  
*DiGuglielmo*, 544 U.S. 408, 416, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)  
(citing *Rhines*, 544 U.S. at 278, 125 S.Ct. 1528).

10           Similarly, our cases on the meaning of good cause under *Rhines*  
11 are also sparse. In *Jackson v. Roe*, 425 F.3d 654 (9<sup>th</sup> Cir.2005), we held  
12 that good cause does not require a showing of “extraordinary  
13 circumstances.” *Id.* at 661-62. In *Wooten v. Kirkland*, 540 F.3d 1019 (9<sup>th</sup>  
14 Cir. 2008), we held that a petitioner did not establish good cause simply by  
15 alleging that he was “under the impression” that his claim was exhausted.  
*Id.* at 1024. We explained that accepting as good cause the mere “lack of  
knowledge” that a claim was exhausted “would render stay-and-abey  
orders routine” because “virtually every habeas petitioner” represented by  
counsel could assert that he was unaware of his attorney's failure to  
exhaust. *Id.*

16 745 F.3d at 980-81; see also *id.*, at 981-82 (clarifying *Wooten*).

17           *Blake* establishes, however, that the good cause required under *Rhines* cannot  
18 be more demanding than the showing of cause required under the Supreme Court's  
19 recent decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012):

20           Our holding, that IAC by post-conviction counsel can be good  
21 cause for a *Rhines* stay, is consistent with and supported by the Supreme  
22 Court's recent opinion in *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309,  
182 L.Ed.2d 272 (2012), in which it established a limited exception to the  
23 rule of *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115  
L.Ed.2d 640 (1991), that IAC by state post-conviction counsel “at initial-  
24 review collateral proceedings may establish cause for a prisoner's  
procedural default of a claim of ineffective assistance at trial.” 132 S.Ct. at  
25 1315. We believe that good cause under *Rhines*, when based on IAC,  
cannot be *any more* demanding than a showing of cause under *Martinez*  
26 to excuse state procedural default.[FN7] Unlike a successful showing of  
cause under *Coleman* and *Martinez*, an IAC-based showing of good  
27 cause under *Rhines* *only permits a petitioner to return to state court* — not  
bypass the state court as would be the case under *Coleman* — to exhaust  
28 his unexhausted claims. Because a *Rhines* stay and abeyance does not  
undercut the interests of comity and federalism embedded in our habeas  
jurisprudence, a *Rhines* petitioner arguing IAC-based good cause is not



1 required to make *any stronger* a showing of cause than a *Coleman/*  
 2 *Martinez* petitioner. *Id.* at 1318 (stating that “cause” is established when a  
 3 petitioner’s post-conviction counsel is “ineffective under the standards of  
 4 *Strickland*”); see also *Detrich v. Ryan*, 740 F.3d 1237, 1243-45 (9th  
 5 Cir.2013) (*en banc*) (plurality opinion) (discussing the showing of “cause”  
 6 required under *Martinez* and *Trevino v. Thaler*, — U.S. —, 133 S.Ct.  
 7 1911, 1918, 185 L.Ed.2d 1044 (2013)).

8 [FN7] Because *Blake* meets the *Coleman* showing of  
 9 cause, we leave for another day whether some lesser  
 10 showing will suffice to show good cause under *Rhines*. The  
 11 Supreme Court’s statement in *Pace*, 544 U.S. at 416, 125  
 12 S.Ct. 1807, however, that “[a] petitioner’s reasonable  
 13 confusion about whether a state filing would be timely will  
 14 ordinarily constitute ‘good cause’” under *Rhines*, suggests  
 15 that this standard is, indeed, *lesser* than the cause standard  
 16 discussed in *Coleman* and applied in *Martinez*.

17 745 F.3d at 983-84 & n.7 (emphasis added).

18 Respondents contend that petitioner cannot establish good cause under *Blake*  
 19 because he cannot demonstrate that post-conviction counsel provided ineffective  
 20 assistance. Respondents contend that the claim of ineffective assistance of trial counsel  
 21 in Ground 7 is without merit based on the evidence in the state court record. They  
 22 maintain that post-conviction counsel therefore was not ineffective for failing to raise the  
 23 claim.<sup>13</sup>

24 The Court is not persuaded based upon the factual arguments made by  
 25 respondents.

26 First, petitioner’s statements rejecting a prior proposed plea bargain in his case  
 27 do not necessarily belie his claim that he later was willing to accept a proposed plea  
 28 bargain allegedly being discussed on October 14, 2005. Substitute defense counsel’s  
 statements on the record that day — with Wright present — support Wright’s claim that  
 he then was willing to accept the proposed plea bargain:

Brad Van Ry on behalf of Mr. Wright. I’ve had a conversation with  
 my client today. He indicates a willingness to enter into a guilty plea which

<sup>13</sup>The claim was not foreclosed in either the Ninth Circuit or the Supreme Court of Nevada at the time that counsel was litigating the petition in the state district court. Both courts had held that a petitioner could demonstrate ineffective assistance of trial counsel in connection with the rejection of a plea bargain. See, e.g., *Nunes v. Mueller*, 350 F.3d 1045 (9<sup>th</sup> Cir. 2003); *Larson v. State*, 104 Nev. 691, 766 P.2d 261 (1988).

1 has been offered by the State. However, [Deputy District Attorney] Mr.  
 2 Sattler is unwilling to proceed in this case right now and he's not sure if a  
 3 package deal is a contingency of the guilty plea. We ask that this case be  
 set for about two weeks from now for a change of plea as to Mr. Wright.

4 Dkt. no. 19, Ex. 27 at 2. See also dkt. no. 39, Ex. 144, ¶5 (November 25, 2013,  
 5 declaration by Wright).

6 Second, Wright's December 19, 2005, dated proper person motion to dismiss  
 7 counsel and appoint new counsel<sup>14</sup> does not necessarily establish, as respondents'  
 8 suggest, that Wright "intended to proceed to trial" rather than accept a plea bargain.  
 9 Prior to that motion, trial counsel had appeared on November 4, 2005, and stated on the  
 10 record — without Wright being present — that there was no plea deal on the table:

11 Your Honor, at this time, we were prepared to simply reset the case  
 12 for trial. My brother was here in my place the last time and there was a  
 13 misunderstanding. We had thought there were negotiations, but there's  
 not, and so we'd ask the Court to reset this case for trial as to both  
 defendants.

14 Dkt. no. 19, Ex. 28, at 3. Wright asserts that counsel did not advise him prior to the  
 15 November 4, 2005, status hearing that plea negotiations had been terminated and that  
 16 the case was going to be reset for trial.<sup>15</sup> Respondents rely on the following statement  
 17 by Wright in the December 19, 2004, dated motion: "The Defendant cannot safely go to  
 18 trial upon a realistic recognition of the obvious truth; that the defendant does not have  
 19 the professional legal skill to protect himself."<sup>16</sup> The Court is not sanguine that a  
 20 defendant's statement that he wants a new attorney because neither current counsel  
 21 nor the defendant can adequately defend him at trial reflects a willingness and  
 22 readiness to go to trial rather than accept a plea deal. Petitioner alleges in Ground 7  
 23 that defense counsel unilaterally abandoned plea discussions. His proper person  
 24 entreaty for new counsel does not necessarily support an inference that he was  
 25 ///

26 \_\_\_\_\_  
 27 <sup>14</sup>Dkt. no. 19, Ex. 30.

28 <sup>15</sup>Dkt. no. 39, Ex. 144, ¶6.

<sup>16</sup>See dkt. no. 51, at 5, quoting dkt. no. 19, Ex. 30, at 2.

1 unwilling to enter a plea with competent counsel pursuing both a possible favorable plea  
2 deal as well as preparing a vigorous defense in the event of a trial.

3 The Court emphasizes the preliminary nature of the procedural question  
4 presented on a motion to stay. The district court is determining only the preliminary  
5 procedural issue of whether the federal action should be stayed while the petitioner  
6 pursues further exhaustion in the state courts. *Cf. Blake*, 745 F.3d at 984 (satisfaction of  
7 the *Rhines* good-cause standard “only permits a petitioner to return to state court . . . to  
8 exhaust his unexhausted claims” and thus does not require a stronger showing than  
9 that required to establish cause under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), to  
10 overcome a procedural default). The Court thus, clearly, is not going to definitively  
11 resolve the claim in Ground 7 as a prerequisite to determining whether to enter a stay to  
12 afford the state courts an opportunity to consider the claim in the first instance. *Cf.*  
13 *Gonzalez v. Wong*, 667 F.3d 965, 979-80 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 155  
14 (2012) (noting that, in the circumstances presented, a stay was appropriate because it  
15 provided the state courts with the first opportunity to resolve a *Brady* claim based upon  
16 evidence developed on federal habeas review). Rather, it suffices for the present good-  
17 cause inquiry that petitioner has presented a colorable or potentially meritorious claim  
18 that state post-conviction counsel was ineffective for failing to pursue a colorable or  
19 potentially meritorious claim of ineffective assistance of trial counsel. *Cf. id.* (good cause  
20 established where the petitioner presented a colorable or potentially meritorious *Brady*  
21 claim).

22 The Court accordingly finds that petitioner has demonstrated good cause under  
23 *Rhines* and *Blake* for the prior failure to exhaust the claim in Ground 7, with regard to  
24 the preliminary procedural question presented on the motion to stay. The State, of  
25 course, can pursue its arguments contesting the merits of the claim during the  
26 exhaustion of the claim in the state courts. The Court neither makes a holding on nor  
27 implies a view of the merits of the claim.

28 ///

1           **B.     Not Plainly Meritless**

2           When the *Rhines* Court discussed the issue of whether a petitioner has  
3 presented a claim that is not plainly meritless, the Court made a comparison cite to 28  
4 U.S.C. § 2254(b)(2) concerning this inquiry. 544 U.S. at 277. The Ninth Circuit has held  
5 that a district court may reject an unexhausted claim on the merits pursuant to §  
6 2254(b)(2) “only when it is perfectly clear that the applicant does not raise even a  
7 colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9<sup>th</sup> Cir. 2005).

8           The Court finds that Ground 7 raises at least a colorable federal claim. The Court  
9 rejects respondents’ argument that it should find the claim “meritless” because it  
10 allegedly is procedurally defaulted. At the outset, “meritless” does not mean  
11 “procedurally barred.” Moreover, in line with the preceding discussion, the Court  
12 declines the invitation to conduct a conclusive procedural default inquiry, which  
13 potentially might require an evidentiary hearing, on a preliminary procedural issue of  
14 whether a stay should be entered. Here, such an inquiry potentially could entail a fact-  
15 intensive examination of whether petitioner can demonstrate prejudice from trial  
16 counsel’s alleged unilateral abandonment of plea discussions. Such an inquiry is not  
17 contemplated under a standard seeking to determine only whether “it is perfectly clear  
18 that the applicant does not raise even a colorable federal claim.”

19           As the Court has observed in other contexts, the cause-and-prejudice and other  
20 standards applied to overcome a procedural bar are substantially the same in Nevada  
21 state court and federal court.<sup>17</sup> The state courts should be afforded the first opportunity

22           <sup>17</sup>Under state practice, “[a] petitioner can overcome the bar to an untimely or  
23 successive petition by showing good cause and prejudice.” *E.g., Mitchell v. State*, 149  
24 P.3d 33, 36 (Nev. 2006). In *Robinson v. Ignacio*, 360 F.3d 1044 (9<sup>th</sup> Cir. 2004), the  
25 court of appeals recognized that “Nevada’s ‘cause and prejudice’ analysis and the  
26 federal ‘cause and prejudice analysis’ are nearly identical, as both require ‘cause for the  
27 default and actual prejudice as a result.’” 360 F.3d at 1052 n.3. Moreover, the Nevada  
28 state courts also recognize the same exception for a fundamental miscarriage of justice,  
such that “[e]ven when a petitioner cannot show good cause sufficient to overcome the  
bars to an untimely or successive petition, habeas relief may still be granted if the  
petitioner can demonstrate that ‘a constitutional violation has probably resulted in the  
conviction of one who is actually innocent.’” *Mitchell*, 149 P.3d at 36 (quoting *Murray v.*  
*Carrier*, 477 U.S. 478, 496 (1986)).

1 to possibly apply state procedural bars or potentially consider the merits of the  
 2 constitutional claim. *Cf. Blake*, 745 F.3d at 984 (a *Rhines* stay furthers rather than  
 3 undercuts the interests of comity and federalism embedded in habeas jurisprudence);  
 4 *Gonzalez, supra*.

### 5 **C. No Intentionally Dilatory Tactics**

6 Nothing in the record before the Court reflects that petitioner has engaged in  
 7 intentionally dilatory tactics. While it perhaps is not inconceivable that a noncapital  
 8 habeas petitioner might engage in intentionally dilatory tactics, the relevance of this  
 9 factor, as a practical matter, largely is restricted to capital cases.<sup>18</sup>

10 Respondents urge that petitioner engaged in intentionally dilatory tactics  
 11 because: (a) nothing prevented petitioner from raising the claim in his proper person  
 12 original state or federal petitions; (b) petitioner was under constructive notice from  
 13 *Duncan v. Walker*, 533 U.S. 167(2001), that the filing of a federal petition does not toll  
 14 the running of the federal limitation period as to the later assertion of claims; (c)  
 15 petitioner nonetheless made no effort to exhaust the claim; and (d) given “that the  
 16 rationale behind *Rhines* is to somewhat soften the effects of *Duncan*, granting a stay in  
 17 this action would undermine the rationale of *Rhines* because Wright has made no effort  
 18 himself to mitigate the effects of *Duncan*.”<sup>19</sup>

19 Respondents thus essentially argue that a petitioner engages in intentionally  
 20 dilatory tactics when the petitioner fails to raise a claim *pro se* that his state post-  
 21 conviction counsel did not raise. Denying a stay on such a basis would stand not only  
 22 *Rhines* but also *Martinez* and *Blake* on their head. A petitioner demonstrates cause

---

23  
 24 <sup>18</sup>*Cf. Lawrence v. Florida*, 549 U.S. 327, 344 & n. 9 (2007) (Ginsburg, J.,  
 25 dissenting) (“Most prisoners want to be released from custody as soon as possible, not  
 26 to prolong their incarceration. They are therefore interested in the expeditious resolution  
 27 of their claims. . . . Though capital petitioners may be aided by delay, they are a small  
 28 minority of all petitioners.”); *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9<sup>th</sup> Cir. 2010),  
*vacated for reconsideration on other grounds*, 131 S.Ct. 1042 (Jan. 24, 2011)(petitioner  
 “had not engaged in dilatory tactics and he had no motivation for delay, as he is not a  
 capital defendant”).

<sup>19</sup>Dkt. no. 51, at 6-7.

1 under *Martinez*, and hence good cause under *Blake*, if he failed to exhaust a claim of  
 2 ineffective assistance of counsel due to an absence of effective assistance of counsel in  
 3 the state post-conviction proceedings. Under *Martinez*, such an absence of effective  
 4 assistance of post-conviction counsel can occur *either* because post-conviction counsel  
 5 was ineffective *or*, obviously, because a *pro se* petitioner had no post-conviction  
 6 counsel at the relevant time.<sup>20</sup> It simply would be an absurd holding for a court to find  
 7 that a petitioner had demonstrated good cause for the failure to exhaust a claim under  
 8 *Rhines*, *Martinez*, and *Blake* and to then find that the petitioner had engaged in  
 9 intentionally dilatory tactics on the premise that nothing prevented the petitioner from  
 10 raising the unexhausted claim previously *pro se*. *Denial* of a stay on that basis not only  
 11 would undermine the rationale of *Rhines*, it would render the decision in large part dead  
 12 letter.

13 In prior cases, this Court repeatedly has rejected respondents' argument that  
 14 would seek to require that petitioners — notwithstanding contrary Ninth Circuit authority  
 15 — satisfy the extraordinary circumstances standard required for equitable tolling in order  
 16 to establish good cause for a stay.<sup>21</sup> Respondents essentially seek to pursue the same  
 17 rejected argument now instead under the second *Rhines* factor. Respondents now  
 18 argue under this factor that a petitioner must show that something stood in his way and  
 19 prevented him from pursuing the claim previously *pro se* in order to establish that he  
 20 was not intentionally dilatory. The argument is no more persuasive in this context.

21 The Court, accordingly, finds on the record and arguments presented that  
 22 petitioner has not engaged in intentionally dilatory tactics.<sup>22</sup> Petitioner's request for a

23 <sup>20</sup>See *Martinez*, 132 S.Ct. at 1320 ("Where, under state law, claims of ineffective  
 24 assistance of trial counsel must be raised in an initial-review collateral proceeding, a  
 25 procedural default will not bar a federal habeas court from hearing a substantial claim of  
 26 ineffective assistance at trial if, in the initial-review collateral proceeding, *there was no*  
 27 *counsel* or counsel in that proceeding was ineffective.") (emphasis added).

28 <sup>21</sup>See, e.g., *Lewis v. Legrand*, Case No. 2:10-cv-1225-PMP-CWH, dkt. no. 76, at  
 4-6 (D. Nev. June 2, 2014).

<sup>22</sup>The Court additionally notes — with respect to the focus on the limitation period  
 in this argument — that the *pro se* petitioner did in fact assert the claim within the  
 limitation period in federal court. See the text, *supra*, at 6-10.



1 stay therefore will be granted, following upon the satisfaction of the *Rhines* criteria.

#### 2 **D. Remaining Matters**

3 Respondents request in the alternative that if the Court grants the motion for a  
4 stay that it instruct petitioner under *Slack v. McDaniel*, 529 U.S. 473 (2000), that the  
5 failure to exhaust all of his claims before returning to federal court will be grounds for  
6 dismissal with prejudice for failure to comply with a court order.

7 The language in *Slack* upon which respondents rely is found within the following  
8 discussion by the Supreme Court:

9 . . . . [We hold that a] petition filed after a mixed petition has been  
10 dismissed under *Rose v. Lundy* before the district court adjudicated any  
11 claims is to be treated as “any other first petition” and is not a second or  
12 successive petition.

12 . . . .  
13 The State complains that this rule is unfair. The filing of a mixed  
14 petition in federal court requires it to appear and to plead failure to  
15 exhaust. The petition is then dismissed without prejudice, allowing the  
16 prisoner to make a return trip through the state courts to exhaust new  
17 claims. The State expresses concern that, upon exhaustion, the prisoner  
18 would return to federal court but again file a mixed petition, causing the  
19 process to repeat itself. In this manner, the State contends, a vexatious  
20 litigant could inject undue delay into the collateral review process. To the  
21 extent the tactic would become a problem, however, it can be countered  
22 without upsetting the established meaning of a second or successive  
23 petition.

18 First, the State remains free to impose proper procedural bars to  
19 restrict repeated returns to state court for postconviction proceedings.  
20 Second, provisions of AEDPA may bear upon the question in cases to  
21 which the Act applies. AEDPA itself demonstrates that Congress may  
22 address matters relating to exhaustion and mixed petitions through means  
23 other than rules governing “second or successive” petitions. *E.g.*, 28  
24 U.S.C. § 2254(b)(2) (1994 ed., Supp. III). Third, the Federal Rules of Civil  
25 Procedure, applicable as a general matter to habeas cases, vest the  
26 federal courts with due flexibility to prevent vexatious litigation. As *Slack*  
27 concedes, in the habeas corpus context it would be appropriate for an  
28 order dismissing a mixed petition to instruct an applicant that upon his  
return to federal court he is to bring only exhausted claims. See Fed.  
Rules Civ. Proc. 41(a) and (b). Once the petitioner is made aware of the  
exhaustion requirement, no reason exists for him not to exhaust all  
potential claims before returning to federal court. The failure to comply  
with an order of the court is grounds for dismissal with prejudice. Fed.  
Rule Civ. Proc. 41(b). In this case, however, the initial petition was  
dismissed without condition and without prejudice. We reject the State’s  
argument that refusing to give a new meaning to the established term  
“second or successive” opens the door to the abuses described.

529 U.S. at 487-89.

1        *Slack* was decided only a relatively short time after the adoption of AEDPA and  
2        the above discussion was directed to a decidedly pre-AEDPA procedural concern — a  
3        prospect of unrestricted filing of mixed petitions in multiple serial federal actions. The  
4        intervening holding in *Duncan, supra*, that a prior federal petition does not toll the  
5        federal limitation period as to later filings largely eliminates the prospect that a petitioner  
6        will be able to keep coming back to federal court with serial mixed petitions.<sup>23</sup> In this  
7        Court, such an untimely petition following the dismissal of a prior mixed petition likely  
8        would be met with a show-cause order prior to service — assuming that a petitioner  
9        would opt for a full dismissal of a mixed petition post-AEDPA given the limitation period  
10       concerns. Under the intervening post-*Slack* law, a petitioner instead generally must  
11       obtain a stay in order to be able to stop the federal proceedings, return to state court,  
12       and then reinstate federal proceedings. If he does not obtain a stay, he generally faces  
13       a choice of either a complete dismissal leading to a time-bar dismissal on his return to  
14       federal court or a partial dismissal of the unexhausted claims with the federal action  
15       then proceeding forward immediately. Under the stay procedure, the district court — not  
16       the petitioner — has direct control over whether a petitioner can successfully stop and  
17       restart the federal proceedings to present serial mixed pleadings.

18        Against that backdrop, the Court sees no need to make — or justification for  
19        making — an advisory pronouncement regarding possible future unexhausted claims.  
20        Obviously, a petitioner in most circumstances would have a steeper hill to climb to  
21        establish good cause for a second stay request and/or to pursue unexhausted claims.  
22        However, any number of situations may arise between two requests for relief that  
23        conceivably might provide such cause. Prudence counsels in favor of ruling on just one  
24        request for relief at a time. Meanwhile, as the *Slack* opinion suggests, a federal district  
25        ///

---

26  
27        <sup>23</sup>The later decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), that an  
28        untimely or otherwise not properly filed state petition also does not toll the limitation  
      period makes the prospect of such serial filings even less likely.

1 court has a number of means at its disposal to address the situation of a vexatious  
2 noncapital habeas filer, if and as such a circumstance is presented.

3 The Court accordingly declines to give the requested instruction that the action  
4 will be dismissed with prejudice if petitioner returns to federal court with unexhausted  
5 claims.

6 The Court otherwise expresses no opinion as to whether petitioner might be able  
7 to satisfy the requirements for a stay as to the other unexhausted grounds. Petitioner  
8 need satisfy the *Rhines* criteria only as to one ground, and the Court's inquiry extends  
9 only to whether a stay should be entered. It does not conduct a claim-by-claim  
10 assessment as to whether the *Rhines* criteria are satisfied if it determines that a stay is  
11 warranted as to at least one ground. The Court thus only is entering a stay. It is not  
12 granting permission to pursue specific claims and/or directing petitioner to pursue  
13 specific claims. Petitioner instead determines what claims are pursued during the stay  
14 over and above the claim that serves as the predicate for a stay. The Court therefore  
15 expresses no opinion as to whether petitioner also might be able to establish a basis for  
16 a stay independently as to the remaining unexhausted claims. As to those particular  
17 claims, if the claims remain unexhausted after the stay, they will have to be dismissed  
18 prior to the action proceeding forward. *Rose, supra*.

19 Finally, the Court expresses no conclusive opinion by this order as to whether the  
20 circumstances presented satisfy the cause-and-prejudice standard with respect to any  
21 claim of procedural default. The holding herein should not be read as an express or  
22 implied holding on that issue or any other issue, including as to the merits. The Court  
23 holds here only that the criteria for a stay under *Rhines* have been satisfied, and its  
24 holding in this order is expressly limited to that specific context.<sup>24</sup>

25 ///

26 ///

---

27 <sup>24</sup>The Court further makes no implied finding that petitioner was required to wait  
28 on the ruling on the pending motions prior to seeking further relief in the state courts.

1     **V.     CONCLUSION**

2             It is therefore ordered that the motion to dismiss (dkt. no. 40) is granted in part  
3 and denied in part, such that the Court holds that Grounds 2, 4, 6 and 7 are  
4 unexhausted.

5             It is further ordered that petitioner's motion to stay (dkt. no. 47) is granted and  
6 that this action is stayed pending exhaustion of Ground 7. Petitioner may move to  
7 reopen the matter following exhaustion of the claim, and any party otherwise may move  
8 to reopen the matter at any time and seek any relief appropriate under the  
9 circumstances.

10            It is further ordered that the grant of a stay is conditioned upon petitioner  
11 commencing a collateral review proceeding in the state district court within forty-five  
12 (45) days of this order and returning to federal court with a motion to reopen within forty-  
13 five (45) days of issuance of the remittitur by the Supreme Court of Nevada at the  
14 conclusion of all state court proceedings.<sup>25</sup>

15            It is further ordered that, with any motion to reopen filed following completion of  
16 all state court proceedings pursued, petitioner: (a) shall attach an indexed chronological  
17 set of exhibits (with the corresponding CM/ECF attachments identified by exhibit  
18 number(s) on the docketing system) containing the state court record materials relevant  
19 to the issues herein that cover the period between the state court record exhibits on file  
20 in this matter and the motion; and (b) if petitioner then intends to further amend the  
21 petition, shall file a motion for leave to amend along with the proposed verified amended  
22 petition or a motion for extension of time to move for leave.<sup>26</sup> Respondents shall have  
23 thirty (30) days to file a response to the motion(s) filed. The reopened matter will  
24 proceed under the current docket number.

25            <sup>25</sup>If *certiorari* review will be sought or thereafter is being sought, either party may  
26 move to reinstate the stay for the duration of any such proceedings. *Cf. Lawrence v. Florida*, 549 U.S. 327, 335 (2007).


27            <sup>26</sup>No claims are dismissed by this order. Nothing in this order limits the claims  
28 that petitioner may assert in the state courts during the stay, subject to applicable  
defenses.

1 It is further ordered that any further hard copies of exhibits shall be sent — for any  
2 further proceedings in this case — to the Clerk's Office in Reno. Counsel need not  
3 resend any copies sent previously instead to Las Vegas.

4 It is further ordered that petitioner's motion for an enlargement of time (dkt. no.  
5 52) is granted *nunc pro tunc* in connection with the reply filed on May 8, 2014. Dkt. no.  
6 54.

7 It is further ordered that the Clerk of Court shall administratively close this action  
8 until such time as the Court grants a motion to reopen the matter.

9 DATED THIS 9<sup>th</sup> day of June 2014.

10  
11   
12 \_\_\_\_\_  
13 MIRANDA M. DU  
14 UNITED STATES DISTRICT JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28